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No. 84-1728

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

*v.*

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONER

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Respondents devote a substantial portion of their briefs to contesting propositions that are not in dispute, in the process making this already complex case appear more confusing than it actually is. We certainly agree with respondent Federal Labor Relations Authority (FLRA or Authority), for example, that "the fact that a bargaining proposal mentions a management right enumerated in [5 U.S.C.] Section 7106(a)(2), including the right to contract out, does not of itself render a proposal non-negotiable" (FLRA Br. 17; *id.* at 22-24); we similarly agree that the procedures for implementing management rights and arrangements for affected employees may be discussed at the bargaining table (see FLRA Br. 25-26, 34-35; Union Br. 22). We never have denied that arbitration is a generally desirable method by which to settle labor disputes (see Union Br. 41-43), or suggested that

arbitrators lack the authority or competence to interpret federal regulations (see FLRA Br. 36-37; Union Br. 17-18).[1] And nothing in our argument rests on the proposition that contracting out does not affect "conditions of employment" (see FLRA Br. 31-33), or seeks to establish that the various management rights listed in Section 7106(a)(2) should have differing legal effects (see FLRA Br. 22, 29-32; Union Br. 22-25).

Because respondents have chosen to address all of these peripheral issues, however, our central thesis bears repeating. We recognize (see EEOC Br. 29-34), of course, that the management rights listed in Section 7106(a)(2) must be exercised in accordance with "applicable laws."[2] But that is the only constraint imposed by the Civil Service Reform Act (Act) on the exercise of management prerogatives. The Union's proposal here—which would bind the Equal Employment Opportunity Commission (EEOC) to comply with Office of Management and Budget (OMB) Circular A-76 when the agency exercises its reserved right to contract out—therefore is negotiable only if the Circular is an "applicable law." And as the EEOC's opening brief explains (at 17-35), Circular A-76

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[1] For that matter, we have no quarrel with the Authority's suggestion that there is a presumption of arbitrability in private sector labor disputes (FLRA Br. 32), although the relevance of that proposition to this case is far from clear. Similarly, respondents undoubtedly are correct in suggesting (FLRA Br. 28-29; Union Br. 44-45) that the government may attempt to exclude certain bargainable matters from its collective bargaining agreements. But that hardly is a complete protection for management rights: if a bargaining impasse is reached, the Federal Service Impasses Panel may order the inclusion of the disputed provision in the contract (see EEOC Br. 2-3). In any event, if a bargaining proposal implicates a management right, bargaining about that proposal is altogether impermissible—as the Authority recognizes (FLRA Br. 19).

[2] The Union thus misstates our position (Union Br. 22-24) in reading our opening brief to mean that the "in accordance with applicable laws" language does not constrain management rights.

is not a law at all, let alone an "applicable" one within the peculiar meaning of Section 7106(a)(2). Nothing in respondents' briefs casts any doubt on that conclusion.

A. At the outset, respondents attempt to avoid addressing the meaning of the management rights clause at all. They accomplish this sleight-of-hand by asserting (FLRA Br. 22-25; Union Br. 19-21) that Section 7106 in no way limits the scope of the grievance machinery created by the Act. Instead, they maintain that the clause serves only to keep the parties from *negotiating* about management rights; it does not, they argue, limit the authority of employees to grieve, and arbitrators to decide, issues involving management prerogatives.[3] This proposition is central to respondents' analysis, as it was to the court of appeals' (see EEOC Br. 36-37). If respondents are correct, an agency's asserted failure to comply with Circular A-76 is grievable, whether or not the agency is bound by a collective bargaining agreement that contains a provision like the one at issue here.[4] Against this background, respondents are able to conclude that the inclusion in the contract of the disputed bargaining proposal would not affect the exercise of EEOC's management rights, because the disputed provision simply confirms that alleged failures to comply with the Circular already are grievable (see Union Br. 21).

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[3] Respondents insist that only the matters specified in 5 U.S.C. 7121(c) are excluded from the Act's grievance machinery (FLRA Br. 22; Union Br. 20, 24).

[4] An asserted violation of Circular A-76, of course, is grievable only if the Circular is a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii). In arguing that it is, respondents rely principally on the legislative history of 5 U.S.C. 7117, where Congress indicated that an identical phrase should be read to include binding policy statements (FLRA Br. 35; Union Br. 41). As we explained in our opening brief (EEOC Br. 37-38), however, reading Section 7103(a)(9)(C)(ii) to refer to every law, rule, and regulation on the books would allow unions to obtain arbitration (potentially without judicial review) of virtually every decision taken pursuant to law by every federal agency. Respon-

Respondents' understanding of the relationship of the management rights clause to the Act's grievance and arbitration machinery, however, plainly is flawed. The language of Section 7106(a) is unequivocal: it provides that "nothing in this chapter"—which includes the grievance provisions—"shall affect" management's authority to exercise its reserved prerogatives. By its terms, the reach of this provision is not restricted to management's duty to bargain, for "Congress did *not* say that management's reserved rights are *nonnegotiable*; it said, '*nothing in this chapter shall affect*' the right of the agency to make contracting-out decisions." *Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1402 n.7 (9th Cir. 1985) (emphasis in original), petition for cert. pending, No. 85-777. Congress thus placed the management rights clause in a separate section titled "[m]anagement rights," rather than in the provision of the Act dealing with negotiation—in contrast to Executive Order No. 11491, which placed its management rights provisions in sections titled "[n]egotiation of agreements" and "[b]asic provisions of agreements." Exec. Order No. 11491, §§ 11, 12, 3 C.F.R. 861 (1966-1970 comp.), *reprinted at* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* at 1250, 1251 (Comm. Print 1979) [hereinafter cited as *Leg. Hist.*].[5]

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dents nowhere deny that Congress could not have intended such a result. Even if it may be characterized as a binding policy statement, then, Circular A-76 does not address the sort of personnel decisions that Congress imagined would be grievable under Section 7103(a)(9)(C)(ii). See EEOC Br. 29-34, 37-38.

[5] Recognizing that the management rights clause applies to the Act's grievance mechanism as well as to the bargaining process would hardly, as the Union asserts (Union Br. 24), render Section 7121(c) superfluous. We recognize that management rights must be exercised in accordance with applicable laws (see EEOC

Respondents nevertheless maintain that the Act's legislative history supports their contentions about the scope of the grievance machinery (Union Br. 31-33; FLRA Br. 24-25), relying in large part on Rep. Ford's statement that "infractions of [rules] are fully grievable even if the rule * * * implicates some management right" (see Union Br. 31 (quoting *Leg. Hist.* 998)). We note that these post-enactment remarks are entitled to little weight. See *AFGE, Locals 225, 1504 & 3723* v. *FLRA*, 712 F.2d 640, 647 & n.29 (D.C. Cir. 1983). See generally *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). And in the cited remarks Rep. Ford was, in any event, referring only to matters of procedure: he made clear that his interpretation "is required both by the express language of the section *and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right.*" *Leg. Hist.* 998 (emphasis added). Rep. Ford thus was referring to the portion of the management rights clause establishing a duty to bargain with respect to "procedures which management officials of the agency will observe in exercising any authority under this section." 5 U.S.C. 7106(b)(2).[6]

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Br. 29-34; pages 7-16, *infra*), and unions generally may grieve asserted violations of such laws. Section 7121(c) makes nongrievable even claims concerning the asserted violation of such applicable laws when the grievance concerns the matters specified in that provision.

[6] Respondents also attempt to draw support from the comments of Rep. Udall (FLRA Br. 24, 31; see also Union Br. 31-32), contending that, in his view, 5 U.S.C. 7121 is an "applicable law" within the meaning of Section 7106(a)(2). But such a reading of the statute would be nonsensical; it would parse the management rights clause as providing that "nothing in this chapter shall affect the authority of any management official * * * in accordance with [the provisions of this chapter]" to exercise management rights. In fact, Rep. Udall had a more coherent view of the statute. He made clear that the grievance mechanism was intended principally to permit unions to grieve matters that previously could be raised

But neither the Authority nor the court of appeals—nor either of the respondents before the Court—relied on the Section 7106(b)(2) exception (see EEOC Br. 17-18 n.6).

Respondents' approach, moreover, would have extraordinarily far-reaching effects that they fail to acknowledge. It would, for example, make grievable by force of law not only matters relating to the exercise of the management rights listed in Section 7106(a)(2), but also complaints involving the exercise of the prerogatives preserved by Section 7106(a)(1)—which include the right to set "the mission, budget, organization, number of employees, and internal security practices of the agency." As we suggested in our opening brief (at 42), it is difficult to imagine that Congress intended such a result to follow from the enactment of a statute designed to preserve the flexibility of agency managers. See *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985), slip op. 14; 5 U.S.C. 7101(b).[7]

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only through the so-called statutory appeals procedures (see EEOC Br. 33 n.16, 40), explaining: "The Federal employee unions * * * do gain in my substitute some guarantees about procedures that management must follow. They get to arbitrate some things that now go through a torturous appeal process—things involving various labor grievances. * * * * * [T]he arbitration provision I view as much of a gain for management as for labor. The Federal managers now, instead of having to go through difficult, complex appeal procedures, will be able to submit them to arbitration, and this is a gain for management." *Leg. Hist.* 923.

[7] Indeed, while the Authority now insists that the management rights clause constrains only the duty to bargain, its decisions recognize that "the rights reserved to management may not be infringed by an award of an arbitrator and may not be waived or relinquished by an award of an arbitrator." *PATCO & FAA*, 5 F.L.R.A. 763, 767 (1981); *AFGE, Local 1968 & Department of Transportation, St. Louis Seaway Development Corp.*, 5 F.L.R.A. 70, 77-82 (1981), aff'd *sub nom. AFGE, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). In its brief, the Authority recognizes the force of these decisions (FLRA Br. 26-27), but fails to explain how they can be reconciled with its basic argument.

B. The critical question in this case, then, is not whether complaints about the implementation of Circular A-76 fall within the Act's definition of "grievance"; instead, it is whether the Circular is an "applicable law" of the sort that constrains management rights. If the Circular is not such a "law," the Union's bargaining proposal would impose upon management a legal duty to comply with the Circular where none existed previously, a development that plainly would "affect" the exercise of the agency's reserved right to contract out.[8] And the Union's contentions to the contrary notwithstanding, every tribunal to address the matter—the courts, the Merit Systems Protection Board (MSPB), the Federal Labor Relations Council (FLRC) and the Comptroller General—has concluded that the Circular does not create rights that are enforceable in *any* forum. Such a provision hardly can be characterized as a law that constrains agency management.[9]

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[8] While respondents evidently recognize the centrality of this question (FLRA Br. 18; Union Br. 22-24), they give it remarkably short shrift. The Authority fails to address it at all (see FLRA Br. 33), while the Union speaks to it only obliquely (see Union Br. 33-41).

[9] Respondents contend (FLRA Br. 18 n.14) that the EEOC had not, prior to seeking review in this Court, "suggested that it is not obligated to comply with the Circular." To be sure, the EEOC recognizes and is complying with the direction provided by the President in the Circular. But the EEOC never has represented that it is obligated as a legal matter to comply with the Circular. To the contrary, it specified in its petition for rehearing before the court of appeals (at 3) that "the Circular is intended to be binding only in the sense that it is a management tool." And the EEOC argued before the Authority that because "the Circular is a policy statement * * * the authority vested with the agency head cannot be shared with an exclusive labor-organization or subject to any third party determinations" (C.A. App. 13). Indeed, OMB informs us that EEOC never has completed a cost comparison study of the sort mandated by the Circular, although such studies currently are ongoing. For discussion of recent increases in agency implementation of Circular A-76, see Office of Management and Budget, *Management of the United States Government, Fiscal Year 1986*, at 43-46 (1985).

1. As we explained in our opening brief (at 24-26)—in a discussion nowhere challenged by respondents—the Circular is a policy directive that is not designed to implement any particular statutory requirement. It expressly disavows the intention to create third party rights; like most Executive Branch policy directives, it is "intended primarily as a manage[ment] tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action." *Independent Meat Packers Ass'n* v. *Butz*, 526 F.2d 228, 236 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976). And while, as respondents note (see FLRA Br. 34 n.35), the President certainly expects Executive Branch officials to follow his policy advice, the Circular is binding in precisely the same sense as is a direction given directly by the President to a member of his Cabinet. To our knowledge, no court ever has suggested that an agency's asserted noncompliance with such a directive may be challenged by a third party. See *Kuhl* v. *Hampton*, 451 F.2d 340, 342 (8th Cir. 1971); *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965). Indeed, significant separation of powers concerns would be raised if Congress created a right of action to compel agency compliance with Presidential directives of that sort.

Against this background, it is hardly surprising that every court to consider the question has refused to entertain challenges to agency compliance with the Circular. *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726-727 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *Local 2855, AFGE* v. *United States*, 602 F.2d 574 (3d Cir. 1979). See also *Defense Language Institute*, 767 F.2d at 1401; *AFGE* v. *Dunn*, 561 F.2d 1310, 1315 (9th Cir. 1977); *AFGE* v. *Hoffmann*, 427 F. Supp. 1048, 1083 (N.D. Ala. 1976).[10] Similarly, the MSPB has held that

[10] The Union insists that the courts "have not shut the door completely on challenges to contracting out actions by federal em-

implementation of the Circular is committed by law to the agency. *Griffin* v. *Department of Agriculture*, 2 M.S.P.B. 335, 336 & n.2, 337 (1980).

In response to this array of authority, the Union asserts principally (Union Br. 36-37 & n.32) that agency compliance with the Circular "routinely" is reviewed by the Comptroller General, a state of affairs that the Union believes "belies the employer's position that [the Circular's] provisions are merely advisory or incapable of review without intrusion into areas reserved for an agency's sole discretion" (Union Br. 37). In fact, however, the decisions of the Comptroller General cited by the Union (Union Br. 37 n.32) stand only for the proposition that contracting out criteria will be reviewed when they are incorporated into the terms of a bid solicitation, and thus into an implied contract between the agency and a contractor. See *In re Federal Employee Metal Trades Council, Save Our Jobs Committee*, 64 Comp. Gen. 244, 244-245 (1985); *In re Mercury Consolidated, Inc.*, 63 Comp. Gen. 411, 412 (1984); *In re Lear Siegler, Inc.*, 85-1 Comp. Gen. Dec. P613 (May 30, 1985). None of these decisions suggest that the Circular itself imposes enforceable obligations on the government.

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ployees" (Union Br. 38 n.33). This artfully phrased contention is irrelevant here, however, for the cases cited by the Union involved challenges to the application of statutes and binding regulations (*Lodge 1858, AFGE* v. *Webb*, 580 F.2d 496, 499 (D.C. Cir. 1978), cert. denied, 439 U.S. 927 (1978); *International Ass'n of Firefighters* v. *Department of the Navy*, 536 F. Supp. 1254, 1258 (D.R.I. 1982); *Advo-System, Inc.* v. *Kreps*, 471 F. Supp. 116, 117-118 (D.D.C. 1979)), or to the implementation of contracting out criteria incorporated into a bid solicitation and thus into an implied contract with a contractor (*International Graphics* v. *United States*, 5 Ct. Cl. 100, 102, 107 (1984); *International Graphics* v. *United States*, 4 Ct. Cl. 186, 196-199 (1983)). None of these decisions suggested that challenges to implementation of the Circular are judicially cognizable.

To the contrary, the Comptroller General has flatly *rejected* respondents' position that agency implementation of the Circular is reviewable. He recently declared, for example, that his office

> has repeatedly declined to render decisions concerning the propriety of an agency's determination under Circular A-76 to contract for services instead of performing the work in-house. These determinations are beyond the scope of [the] bid protest decision function because the provisions of the Circular are matters of executive branch policy which do not create legal rights or responsibilities.

*In re Federal Employees Metal Trades Council, Save Our Jobs Committee*, 64 Comp. Gen. 244, 244-245 (1985). Indeed, the Comptroller General has explained more broadly that "Executive orders or directives which are not specifically authorized by statute and which are essentially directed at insuring the efficient operation of the Executive branch are matters of executive policy and do not have the force and effect of law." *In re United States District Court for the District of Columbia*, 58 Comp. Gen. 452, 463 (1979). Accord *In re American Operations Corp.*, 85-1 Comp. Gen. Dec. P231 (Aug. 27, 1985); *In re Excel Services, Inc.*, 85-1 Comp. Gen. Dec. P514 (May 8, 1985).

The Union also looks to pre-Act practice under the Executive Order regime to support its contention that the Circular has been regarded as a law constraining agency management (Union Br. 40-41). Again, however, this contention cannot be squared with the authority. Thus, the FLRC specifically addressed the nature of the Circular, holding early on that "[i]n its own terms A-76 represents policy guidance of a general nature rather than strict injunction and, therefore, does not constitute a regulation of appropriate authority as that phrase is used in the [Executive] Order." *Tidewater Virginia Federal Employees Metal Trades Council & Naval Public Works Center*, 1 F.L.R.C. 431, 441 n.13 (1973). There is

no reason to believe that Congress intended to depart from this understanding when it wrote the Act.[11]

In short, every tribunal to consider the nature of the Circular—both before and after the enactment of the Act—has concluded that the Circular is a tool of presidential management authority that may not be enforced by third parties. And this precedent is hardly, as the FLRA suggests (FLRA Br. 34), "inapposite" to the question whether the Circular is an "applicable legal requirement" that is enforceable by an arbitrator. As we suggested in our opening brief (at 26), it is difficult to imagine that Congress intended to characterize a directive that universally has been held to be unenforceable by anyone other than the President and his delegates as a "law" that constrains management rights.[12] Yet respondents have pointed to no affirmative indication that Congress sought to give unions and union members

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[11] At least in this context, the Union appears to recognize that pre-Act practice is relevant in divining Congress's intent (Union Br. 40). That recognition is well-founded. See *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 103 (1983).

[12] In arguing that Circular A-76 is an "applicable law" within the meaning of Section 7106(a)(2), the Union (Union Br. 41; see also FLRA Br. 35) points to the legislative history of Section 7117, where Congress expressed its intention that "the term 'rules or regulations' be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 158 (1978). Section 7106(a)(2), however, in terms refers only to "laws," not to "rules or regulations"—a choice of language that evidently was intentional, since the management rights clause in Executive Order No. 11491 was conditioned by the requirement of compliance with "applicable laws *or regulations*." Exec. Order No. 11491, § 12(b), 3 C.F.R. 861 (1966-1970 comp.) (emphasis added), *reprinted at Leg. Hist.* 1251. See also note 4, *supra*. Thus, Congress plainly did not make the terms used in Sections 7106(a)(2) and 7117 congruent.

a private right of action to oversee agency compliance with the Circular.[13]

2. Respondents also take issue with our narrower suggestion (EEOC Br. 26-29) that Circular A-76 is not a law that constrains management rights because it addresses decisions that are committed to agency discre-

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[13] The Authority, recognizing that at least portions of the Circular address matters that are committed to agency discretion and hence not arbitrable, suggests that "the extent of the compliance obligation imposed by the Circular is essentially a question of arbitrability" that need not be addressed when the threshhold negotiability determination is made (FLRA Br. 33). This suggestion plainly is flawed. The Authority itself repeatedly has held (as it acknowledges in its brief at 15 & n.10, 19-20 & n.16, 27) that a contract proposal is nonnegotiable if it would impose any new constraints on the exercise of a management right. Because Circular A-76 is not an "applicable law" within the meaning of Section 7106(a)(2), requiring compliance with the Circular would impose such a constraint upon the exercise of the management right to contract out. Negotiation about the Union's proposal therefore is impermissible.

Respondents also suggest (Union Br. 21, 34; FLRA Br. 33 n.33) that various government-wide and agency acquisition and contracting out regulations may be incorporated into the Union's contract with the EEOC, even if Circular A-76 itself is not the subject of a duty to bargain. The Court, however, need not address this contention. The Union proposal itself singles out Circular A-76, and the Authority, the court of appeals, and the parties below focused their attention exclusively on the characteristics of that document. Yet the number of statutes and regulations that arguably are applicable to contracting out determinations are myriad. See, *e.g.*, 48 C.F.R. Pt. 7; EEOC Order No. 281 (July 31, 1985). Respondents have not specified the particular statutes and regulations to which they refer, and certainly have not pointed to contracting out regulations that grant rights to employees as individuals (see EEOC Br. 29-34; pages 14-16, *infra*). Whether or not regulations concerning contracting out may be incorporated into union-agency contracts depends upon an assessment of the nature and application of each provision to determine whether it is an "applicable law" that constrains the exercise of management rights within the meaning of Section 7106(a)(2). That determination should not be made in the first instance by this Court.

tion. Respondents evidently recognize that aspects of the Circular's implementation are unreviewable for this reason (Union Br. 45; FLRA Br. 37). But they insist (Union Br. 34-36; FLRA Br. 37 n.41) that portions of the Circular mandate the use of mechanical calculations, and that an arbitrator appropriately may assess the agency's compliance with those portions.

This contention is insupportable. While respondents insist that the Circular is amenable to third party review, every tribunal to address the matter has held that the Circular generally "fail[s] to provide meaningful criteria against which a [third party] may analyze the [agency's] decision." *Local 2855, AFGE*, 602 F.2d at 581. See EEOC Br. 28-29.[14] The reason for this conclusion is plain. A contracting out decision cannot be disaggregated into its component parts; when even threshold decisions turn on management's judgment about what costs are reasonable,[15] there is little point in breaking out and subjecting to arbitration disputes about mechanical calculations that flow from the discretionary choices made by management.

Respondents' assurances about the willingness of arbitrators and the FLRA to abstain from deciding matters

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[14] Respondents maintain (Union Br. 38 n.33; FLRA Br. 33-34 n.34) that the decisions articulating this principle involved a pre-1979 version of the Circular that lacked a detailed methodology for conducting cost comparisons. This is not correct as a factual matter; several of the decisions cited in our opening brief involved application of the 1979 or later versions of the Circular. *Defense Language Institute*, 767 F.2d at 1399; *AFGE, Local 2017*, 680 F.2d at 724 n.4. In any event, application of every version of the Circular has involved some mechanical steps. See, *e.g.*, Circular A-76 (Aug. 30, 1967) at 5 (listing elements of compensation that must be included in making cost comparison study); *id.* at 6 (specifying interest rate used in making calculations).

[15] To give just one example, in determining personnel costs the agency must make an estimate of the staffing required to perform the work in-house. One of the "tools" to be used in making this estimate is "informed judgment." Supplement to OMB Circular A-76, at IV-I. See EEOC Br. 27-28.

that are committed to the discretion of agency managers also may be viewed with some skepticism. Because the Circular often, for example, fails to define its terms (see EEOC Br. 27), there would likely be disagreement on whether a given decision in fact involves a discretionary judgment. Yet the Authority nowhere offers—indeed, given the nature of the decisions involved, it could not meaningfully offer—guidance on the criteria that it would use to separate discretionary from nondiscretionary judgments. And the government might be unable to obtain judicial review of any questionable Authority decision on the point (see EEOC Br. 22-23 n.12; *United States Marshals Service* v. *FLRA*, No. 83-7973 (9th Cir. Dec. 23, 1985); *Tonetti* v. *FLRA*, No. 85-7485 (11th Cir. Oct. 30, 1985)).

3. Even if the Circular is a "law" that fairly may be said to constrain agency management, another question must be answered before the Circular is held to be a restriction on management rights: whether the Circular is an "applicable law" within the meaning of Section 7106(a)(2). This question is entirely disregarded by respondents, who appear to assume that the application of any law by any agency—so long as the implementation of the law affects working conditions—may be challenged by a union or union member in grievance proceedings.[16]

Respondents' reading of the "applicable laws" phrase, however, leads to absurd results. An agency's attempt to implement virtually any federal law will affect, for

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[16] Respondents evidently read the argument appearing at pages 29-34 of our opening brief as asserting that the management right to contract out differs in kind from the other rights listed in Section 7106(a)(2) (Union Br. 22-25; FLRA Br. 29-32). They misunderstand our contention. We suggest, instead, that the proper inquiry is directed to the question whether the law at issue is an "applicable law" within the meaning of Section 7106(a)(2). If it is a law within the peculiar meaning of that phrase, an agency's asserted failure to comply will be grievable; if it is not, failure to comply will not be grievable whenever implementation of the directive implicates a management right.

example, its decision to assign or direct employees. Yet it is inconceivable that Congress intended the Act to permit arbitrators to judge the propriety of agency compliance with appropriations acts, or with the host of statutes imposing substantive duties on agencies—and to do so in a setting in which judicial review might be unavailable (see EEOC Br. 34). In these circumstances, we established in our opening brief (at 29-34) that Congress meant to describe in Section 7106(a)(2) those laws that are directly applicable to the government as employer—that is, laws governing personnel matters that grant rights to employees as individuals.[17] In contrast, Congress did not encompass within that phrase laws whose implementation affects employees only indirectly or incidentally.

This distinction between personnel and other laws is the only one that is faithful to the "'"provisions of the whole law, and to its object and policy."'" *Lindahl* v. *Office of Personnel Management*, No. 83-5954 (Mar. 20, 1985), slip op. 23-24 (citations omitted). First, it serves to preserve the management rights listed in Section 7106(a)(1). These rights are not limited by the "in accordance with applicable laws" phrase. If the "applicable laws" phrase in subsection (2) of Section 7106(a) were interpreted to permit unions to challenge basic agency decisions to conduct reductions-in-force or to contract out, however, the result would be serious encroachment on the rights preserved by Section 7601(a)(1)—which include the agency's right to set its mission, organization, and number of employees.[18] In addition, the distinction

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[17] It should be noted, of course, that not all agency decisions bearing on individual employees are grievable and arbitrable. See, *e.g.*, 5 U.S.C. 7121(c).

[18] In contrast, to the extent that a contracting out regulation grants rights to individual employees—for example, the right to individualized notice before an employee affected by the basic decision to contract out may be reassigned—an affected employee might grieve noncompliance.

we draw recognizes a congruence between the rights granted unionized and nonunionized employees under the Act. Nonunionized employees are permitted to seek extra-agency review of certain personnel decisions (see 5 U.S.C. 7121(d) and (e)) (and may seek intra-agency review of less serious decisions directly affecting them). Respondents have offered no reason to believe that Congress intended to give union members the right to challenge a vastly greater range of agency action. Cf. *Nutt*, slip op. 13. To the contrary, arbitrators under the Executive Order regime reviewed only traditional personnel decisions and did not act to set aside agency decisions relating, for example, to the size of the agency workforce (EEOC Br. 30-32). Those traditional personnel decisions were the sorts of matters that Congress plainly believed it was making arbitrable when it passed the Act (EEOC Br. 32-33 & n.16; note 6, *supra*).[19]

Against this background, nothing in respondents' briefs so much as suggests that the distinction we propose is inconsistent with the language, history, or policy of the Act. And the basic decision addressed by Circular A-76—whether or not to contract out—plainly is one that relates to agency policy, rather than to the agency's relationship with individual employees. The Circular thus is not an "applicable law" that constrains the exercise of management rights.

C. Respondents also have failed to explain why bargaining over the Union's proposal is not barred by 5 U.S.C. 7117(a)(1). They acknowledge (FLRA Br. 39; Union Br. 26) (as the statute flatly states) that the duty to bargain exists only "to the extent not inconsistent

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[19] Similarly, as we noted in our opening brief (EEOC Br. 37), Section 7121(c) makes nongrievable certain limited matters bearing on personnel management. If Congress imagined that the other provisions of the Act provided that challenges to agency compliance with every law and regulation were to be arbitrable, it is difficult to believe that these matters are the only ones that it would have chosen to exclude from the grievance machinery.

with any Federal law or Government-wide rule or regulation." [20] They evidently recognize that Circular A-76 is a government-wide rule for purposes of Section 7117(a)(1) (Union Br. 39, 41; FLRA Br. 35). Although the FLRA argues to the contrary, the Union proposal plainly is inconsistent with the terms of the Circular.[21] Given these factors, the conclusion that the parties may not bargain over the proposal seems inescapable.

In response to the language of the statute, respondents argue only that the Act cannot mean what it says because Section 7117(a)(1), read literally, would permit a federal agency such as the Office of Personnel Management to issue regulations making specified matters nongrievable (FLRA Br. 38-39). But Section 7117(a)(1) addresses only negotiability, not grievability. To the extent that a statute or regulation does not implicate management rights, an asserted violation of that provision therefore would be grievable by force of law, any government-wide regulation notwithstanding. In any event, Congress

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[20] Indeed, respondents acknowledge (FLRA Br. 39-40 n.42; Union Br. 26) the validity of court of appeals decisions holding that the Act's grievance procedures must yield to the exclusive, government-wide appeal mechanism created by the National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(5) (see EEOC Br. 45-46). While respondents purport to find these cases inapposite because they involve a conflict between two statutes, this distinction is irrelevant; Section 7117(a)(1) in fact accords government-wide regulations dignity equivalent to that of federal law. See, *e.g.*, *Department of the Treasury* v. *FLRA*, 762 F.2d 1119, 1122 (D.C. Cir. 1985).

[21] The Circular provides that it "does not establish, and shall not be construed to create, any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with this Circular," except as provided in the Circular itself. 44 Fed. Reg. 20558 (1979); see also 48 Fed. Reg. 37114 (1983). The FLRA asserts (FLRA Br. 38-39) that the Union proposal is not inconsistent with this provision because the right to arbitral review would be created not by the Circular, but rather by the Act's grievance procedure. As we explain above, however, the drafters of the Circular plainly did not intend to subject its implementation to third party review in any forum.

plainly acted intentionally in drafting Section 7117(a)(1); while using that provision to remove government-wide rules from the bargaining table, in Section 7117(d) it provided labor organizations with "national consultation rights" on the promulgation of such rules. See H.R. Conf. Rep. 95-1717, *supra*, at 155. Respondents' (wholly hypothetical) concerns about the reach of Section 7117(a)(1) accordingly should be presented to Congress.[22]

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

CHARLES FRIED
*Solicitor General*

JANUARY 1986

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[22] The same is true of respondents' analysis of the other portion of Section 7117(a)(1), which provides that the duty to bargain does not extend to "matters which are the subject" of a "government-wide rule or regulation." On its face, this provision bars negotiation about the contracting out process—which of course is the "subject" of the government-wide Circular A-76. In response, respondents (FLRA Br. 38; Union Br. 26) suggest only that this reading of the statute must be too broad, because it would exclude too many subjects from the bargaining process. They have failed, however, to offer any alternative reading of the statutory language.

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